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NOTE

EFFECT OF SECTION 8(b)(1)(A) OF THE TAFT-HARTLEY ACT ON PEACEFUL PICKETING AND RELATED ACTIVITIES OF MINORITY UNIONS

I. INTRODUCTION

Section 8 of the Taft-Hartley Act provides in part:

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . .¹

Section 7 of the act guarantees to employees the right, among others, to refrain from participation in union organization and collective bargaining.²

In a series of recent cases³ the National Labor Relations Board⁴ has been called upon to determine the scope and effect of section 8(b)(1)(A) on peaceful picketing and related activities⁵ by minority or stranger unions. The purpose of this Note is to examine two of these decisions and evaluate the Board's interpretation of that section of the act.

A. The Curtis Case

Local 639 was certified in 1953 by the NLRB as the exclusive bargaining representative for Curtis Brothers' employees. After an impasse had been reached in the resultant collective bargaining, the union began to picket the company's premises. This picketing continued into 1955 when the employer petitioned for a new representation election. The Board directed an election which the union lost. Thereafter the union posted pickets carrying signs which publicized the fact that the firm employed nonunion men and which appealed to the employees to join the union. The employer filed an unfair labor practice charge in 1956 claiming that the union's conduct constituted a violation of section 8(b)(1)(A). Relying on prior case

1. National Labor Relations Act, 49 Stat. 452 (1935), as amended by Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A) (1952) (herein referred to as the Taft-Hartley Act).

2. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952).

3. In November, 1957, there were six such cases before the Board. See Jenkins, *NLRB Rules on Picketing for Recognition*, 40 Lab. Rel. Rep. 472, 474 n.8 (1957).

4. Herein referred to as the NLRB or as the Board.

5. Herein the words "picketing," "related activities," "organized activity," and similar terms, will be used to refer to any activity engaged in by a labor organization whereby it uses its economic power to boycott or request boycott of an employer's business.

law and the legislative history of the act, the trial examiner concluded that 8(b)(1)(A) could not be applied to peaceful minority picketing regardless of its objective.⁶

Nearly a year later the Board overruled this finding, holding that picketing by a minority union to secure immediate recognition "restrains and coerces" employees within the meaning of section 8(b)(1)(A).⁷ The Board reasoned that: (1) the union intends, by such picketing, to cause economic loss to the employer while he refuses to recognize the union as bargaining agent for his employees; (2) this in turn puts pressure on the employees whose job security is jeopardized by the possible loss of business to the employer; and, (3) thus, the union has coerced the employees in their right to refrain from joining the union.

B. The Alloy Case

This reasoning was extended in the *Alloy Mfg. Co.* case,⁸ decided a week after *Curtis*. In this case the union, which represented no more than two of the firm's twelve employees, demanded that the employer sign a union shop agreement. When the employer refused, the union placed the employer's name on its "we do not patronize" list. The employer petitioned for an election, and the union informed the Board that it did not claim to represent any of the employees but expressed its intent to inform the public that the employer did not employ union help and that the existing conditions governing employment were unfair to organized labor. The Board ordered an election in which the union received no votes. A single picket was then stationed at the employer's premises carrying a banner which declared that the employees were "nonunion" and "unfair."

The trial examiner found that the union's picketing which was aimed at winning a union shop violated section 8(b)(2) of the act,⁹ but refused to find that the picketing and distribution of the "we do not patronize" lists violated section 8(b)(1)(A). The Board overruled the latter finding, holding that since appeals to consumers and "we do not patronize" lists contain the same threats to the employees' livelihood as does picketing, these activities by a minority union seeking the unlawful objective of immediate recognition violated section 8(b)(1)(A). Moreover, the Board made it clear that

6. Trial Examiner's Intermediate Report and Recommended Order, Case No. 5-CB-190 (1956).

7. Local 639, Int'l Brotherhood of Teamsters, AFL-CIO and Curtis Bros., Inc., 119 N.L.R.B. No. 33, Lab. Rel. Rep. (41 L.R.R.M. 1025) (1957).

8. Lodge 942, Int'l Ass'n of Machinists, AFL-CIO and Alloy Mfg. Co., 119 N.L.R.B. No. 38, Lab. Rel. Rep. (41 L.R.R.M. 1058) (1957).

9. 41 L.R.R.M. at 1059.

rejection by the employees in an election is not an essential element of the unfair labor practice.¹⁰

Member Murdock dissented from both cases. He argued that the legislative history and prior precedent disclosed that section 8(b)(1)(A) does not prohibit peaceful union activity whatever its purpose. He objected strenuously to the Board's broad theory of "coercion," arguing that it would apply equally well to all picketing and related activities by labor organizations.

This Note will evaluate the determination that Congress authorized the NLRB to proscribe these peaceful minority union activities through application of section 8(b)(1)(A), and will examine the implications of the new broad theory of "coercion" adopted by the Board in these two cases. This will be facilitated by the presentation of two complete arguments, pro and con. The final section will be designed to offer some constructive criteria essential to any sound solution of the problem of minority picketing.

II. CURTIS AND ALLOY: THE CASE AGAINST

Often repeated, almost a cliché, is the proposition that "hard cases make bad law." The facts of the *Curtis* case are "hard." In a fairly conducted election, the union lost its opportunity to represent the company's employees by an overwhelming majority.¹¹ Yet the union continued to picket for recognition, publicizing the fact that the company employed nonunion men, and claiming that the firm and its employees were "unfair to Teamsters."¹² In the *Alloy* case the union went further, placing the employer on its "we do not patronize" list which was widely circulated.¹³ In both cases the Board found that the union activity constituted "coercion" of employees in their right to remain free from union representation, and thus violated section 8(b)(1)(A) of the act.

It is difficult for an academician to find reasonable justification for the union's conduct in these cases, or to argue that justice requires that such conduct should be free from regulation. It appears likely that the union's purpose in continuing picketing under these circumstances was to harass the employer, or to force him to impose an unwanted union upon his employees. Either employer would have committed an unfair labor practice if, in an effort to protect his business, he had given in to the union's demands and recognized it as

10. *Id.* at 1059 n.2.

11. In the *Curtis* case twenty-eight employees voted against the union and only two voted for it. In *Alloy*, the margin was even greater, the union receiving *no* votes out of a total of twelve cast.

12. 41 L.R.R.M. at 1025.

13. *Id.* at 1058.

bargaining agent for his employees.¹⁴ It would seem only fair that the law provide some relief to the employer and his employees from these economic boycotts, and some protection to the public from the resulting industrial unrest.

However, central to the issues involved in these two cases is *not* the question of the desirability of this type of union activity, nor whether or not it *should* be regulated, but simply whether or not Congress intended that it be prohibited by section 8(b)(1)(A) of the act. The purpose of the following argument is to show that in its effort to provide relief for the employer in these two "hard" cases, the Board misconstrued the congressional intent behind that section, and made law which will have significant and far-reaching effect on the legality of all peaceful union activity.

A. An Historical Resumé

To best evaluate the Board's determination that the congressional intent behind section 8(b)(1)(A) justifies proscription of this peaceful union activity, it is necessary to consider the climate which lead to enactment of this provision of the Taft-Hartley Act.

The early growth of unionization in this country was impeded during the nineteenth century by judicial readiness to enjoin organized labor activity whenever its objective was thought by the courts to be "unlawful."¹⁵ Dissatisfaction with the results of this willingness to interfere in labor disputes led to legislation in 1932 in the form of a federal anti-injunction statute, the Norris-La Guardia Act.¹⁶ Proponents of this bill had argued that: courts were unsuited to interfere in cases involving primarily questions of social and economic policy; issuance of an injunction in a labor dispute failed to resolve its underlying problems; and the end result of such an injunction was merely to deprive organized labor of its only really effective weapon.¹⁷ By enacting Norris-La Guardia, Congress suc-

14. Recognition of a minority union constitutes a violation of §§ 8(a)(1), 8(a)(2). See, e.g., *International Metal Products Co. and United Steelworkers, CIO and Sheet Metal Workers Int'l Ass'n*, 104 N.L.R.B. 1076 (1953).

15. See, e.g., *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900); *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (8th Cir. 1897); Frankfurter and Greene, *The Labor Injunction* (1930); Gregory, *Labor and the Law* 83-104 (1946); Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 Minn. L. Rev. 255 (1939).

16. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1952). See Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638 (1932).

17. See Cox, *Labor Law* 106-12 (3d ed. 1954); Frankfurter and Greene, *The Labor Injunction passim* (1930); Gregory, *Labor and the Law* 95-104 (1946); Warm, *supra* note 15, at 300-13; Witte, *Social Consequences of Injunctions in Labor Disputes*, 24 Ill. L. Rev. 772 (1930); Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 647-50 (1932).

ceeded in immunizing in the federal courts all peaceful labor activity regardless of its purpose or objective.¹⁸

Thus, a philosophy of judicial nonintervention into peacefully conducted union activity was established as federal policy. This policy was extended by passage in 1935 of the Wagner Act, which sought to protect the right of employees to engage in concerted activities free from *employer* interference.¹⁹ This statute stated as a declaration of national policy governmental encouragement of the practice of union organization and collective bargaining.²⁰

Enactment of the Taft-Hartley Act expressed congressional rejection of a complete laissez-faire approach to union activities. This statute provided for the use by the NLRB of the cease and desist order to regulate certain practices of unions which experience had shown to be unwarranted and undesirable.²¹ Individual employees were guaranteed, in addition to the right to join labor organizations, the "right to *refrain* from any or all such activities."²² It is important to note, however, that the basic philosophy behind Norris-La Guardia was not altered by the Taft-Hartley Act. Labor organizations were to remain free from judicial intervention into their peacefully conducted activities, except those which Congress had specifically designated as unfair labor practices.²³ The first of these exceptions, section 8(b)(1)(A), provides that it is an unfair labor practice for a labor organization to "restrain or coerce" employees in their rights guaranteed by section 7.²⁴

B. The Plain Meaning of Section 8(b)(1)(A)

In the *Curtis* case the Board held that peaceful recognition picketing by a minority union *clearly* falls within the plain meaning of

18. See, e.g., *United States v. Hutcheson*, 312 U.S. 219, 231-36 (1941). For a discussion of the Minnesota counterpart to Norris-LaGuardia, see McClintock, *The Minnesota Labor Dispute Injunction Act*, 21 Minn. L. Rev. 619 (1937).

19. 49 Stat. 449 (1935).

20. *Ibid.*

21. The powers of the Board to enforce its orders are set out at 61 Stat. 146 (1947), 29 U.S.C. § 160 (1952).

22. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952).

23. See, e.g., *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 673 (1951) ("By § 13, Congress has made it clear that . . . [any part of the act] which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference . . . is 'specifically provided for' in the Act.") (Emphasis added); *Garner v. Teamsters Union, AFL*, 346 U.S. 485, 499 (1953) ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint.")

The union unfair labor practices created by section 8(b) are critically analyzed in Foley, *Union Unfair Labor Practices Under the Taft-Hartley Act*, 33 Va. L. Rev. 697 (1947).

24. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(1)(A) (1952).

section 8(b)(1)(A). The rationale on which this determination was based is that the economic pressure which is exerted on an employer by this picketing coerces those employees who do not desire union representation. Because of the possibility of reduced wages or loss of their jobs, the employees are not free to choose or reject union representation. In the *Alloy* case the Board extended this theory of coercion, holding that the plain meaning of 8(b)(1)(A) also prohibits such activity as (1) picketing for a union shop by a minority union; (2) appeals by a minority union to the employer's consumers stating that the firm is unfair because it is nonunion; and (3) placing the firm on the union's "we do not patronize" list.

It is not the purpose of this argument to enter into the controversy over whether or not peaceful picketing is in fact "coercive,"²⁵ but rather to evaluate the determination by the Board in *Curtis* and *Alloy* that this peaceful minority-union activity "coerces" employees in the sense intended by Congress in 8(b)(1)(A). That the plain meaning of this section does not so clearly indicate a congressional intent to regulate peaceful union activity of this type is perhaps best demonstrated by the fact that prior to its decision in *Curtis* the Board had consistently rejected the theory of coercion now adopted.

The first Board decision interpreting 8(b)(1)(A) involved picketing and a strike by a majority union seeking a hiring-hall contract.²⁶ The trial examiner had found that this conduct constituted coercion of employees to join the union and thus violated 8(b)(1)(A). He reasoned that the effect of forcing the hiring-hall provision on the employer would be to compel those who sought employment to first join the union, and would coerce present employees to join or retain membership in the union. The Board rejected this finding, commenting that this theory of coercion would require outlawing all strikes and picketing which might be opposed by any of the employees. Relying heavily on the legislative history of the act, the Board concluded that the union had not violated 8(b)(1)(A) since there was no evidence of physical violence or intimidation to compel individuals to join the union.

25. There is much discussion in the literature dealing with whether or not peaceful picketing actually "coerces" anyone. For an example of one interesting and provocative debate, compare Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 Va. L. Rev. 1023 (1953), with Gregory, *Picketing and Coercion: A Defense*, 39 Va. L. Rev. 1053 (1953). After lengthy and fascinating debate, Professor Gregory somewhat grudgingly agrees that perhaps peaceful picketing should not be categorized as "coercion" in the derogatory sense. His parting comment is: "So, what?" See Gregory, *Picketing and Coercion: A Conclusion*, 39 Va. L. Rev. 1067, 1069 (1953).

26. National Maritime Union, CIO and The Texas Co., 78 N.L.R.B. 971 (1948).

Consequently, until *Curtis*, the Board found violations of 8(b)(1)(A) *only* in such cases as exertion of physical force against employees;²⁷ threats of force²⁸ or economic reprisal²⁹ against employees; and nonpeaceful picketing which prevented ingress to work.³⁰ In a long line of cases, the *Curtis* theory that peaceful picketing is *itself* "coercive" was urged on the Board but rejected summarily. In each case there was present the possibility of economic loss to the employer and a resulting decrease of earnings or loss of jobs to the employees. In each case the particular union activity affected the employees' right to choose or reject union representation. Yet the Board found, without exception, that peacefully conducted picketing did not constitute "coercion" of employees in the sense intended by Congress in 8(b)(1)(A).³¹

27. *E.g.*, Painters' Dist. Council No. 6, Brotherhood of Painters, AFL and The Higbee Co., 97 N.L.R.B. 654 (1951) (pushing and jostling an employee by a picket; assault on an employee by pickets); United Constr. Workers, Dist. 50, United Mine Workers and Kanawha Coal Operators' Ass'n, 94 N.L.R.B. 1731 (1951) (refusal of pickets to permit employee to unload his truck); United Furniture Workers, CIO and Smith Cabinet Mfg. Co., 81 N.L.R.B. 886 (1949) (carrying sticks and open piling of bricks by pickets; goon-squad mass assaults upon various non-striking employees).

28. *E.g.*, Local 169, Industrial Div. Int'l Brotherhood of Teamsters, AFL and Ann Bodrog, 111 N.L.R.B. 460 (1955) ("Anyone who works for us will always be protected. If not . . . watch out from then on . . . if they catch anybody organizing CIO we'd get rid of them."); Randolph Corp. and Charles Chandler, 89 N.L.R.B. 1490 (1950) ("If you go to work in the morning there will be trouble: guns, knives and blackjacks . . . and I don't know what all. . ."); Teamsters Union, AFL and Conway's Express, 87 N.L.R.B. 972 (1949) ("We do not want to catch you around town making deliveries. . .").

29. *E.g.*, Peerless Tool and Engineering Co. and Marlin Taylor, 111 N.L.R.B. 853 (1955) (threats that it would not process grievances for employees who failed to pay an assessment to the union strike fund); Pinkerton's Nat'l Detective Agency, Inc. and Thomas W. Stenhouse, 90 N.L.R.B. 205 (1950) (threats of expulsion from jobs unless employees retained union membership and paid dues; strike to compel employer to discharge employees who failed to pay back dues); Clara-Val Packing Co. and Nora E. Stiers, 87 N.L.R.B. 703 (1949) (union expelled an employee from membership because she failed to honor a picket line, then forced employer to discharge her under its union shop agreement); Seamprufe, Inc. and International Ladies Garment Workers Union, AFL, 82 N.L.R.B. 892 (1949) (threat that those who do not join the union will lose their jobs: "We have ways of handling people like you. . .").

30. *E.g.*, Local 1150, United Elec. Workers, CIO and Cory Corp., 84 N.L.R.B. 972 (1949) (mass picketing which barred employees ingress and egress to their jobs); International Longshoreman's Union, CIO and Sunset Line and Twine Co., 79 N.L.R.B. 1487 (1948) (forcibly blocking the ingress of employees' automobiles to the place of work).

31. See, *e.g.*, District 50, United Mine Workers and Tungsten Mining Corp., 106 N.L.R.B. 903 (1953) (illegal strike for recognition held violative of 8(b)(4)(C), but not 8(b)(1)(A)); Painters' Dist. Council No. 6, Brotherhood of Painters, AFL and The Higbee Co., 97 N.L.R.B. 654 (1951) (strike and picketing for the purpose of inducing the employees to withdraw the decertification petition does not violate 8(b)(1)(A)); Medford Bldg. and Constr. Trades Council, AFL and Kogap Lumber Industries, 96 N.L.R.B. 165 (1951) (illegal strike and picketing directed toward compelling the com-

Most illustrative of these cases is *Watson's Specialty Store*,³² where after the employees had refused to join the union, the union attempted to force the employer to sign a closed-shop contract covering these employees. When he refused, the union began to picket the store. The general counsel argued that picketing by a union which represented none of the employees constituted economic coercion of Watson's employees to join, and therefore violated section 8(b)(1)(A). The Board rejected this argument, stressing the fact that there was present no attempt to keep customers out of the store or to interfere in any way with the employees on their way to or from work. Relying on the legislative history of 8(b)(1)(A), the Board held that this picketing did not constitute "restraint or coercion" of the employees; rather its effect was to demonstrate to the nonunion workers that it was to their advantage to become union members.

Yet in *Curtis* the Board finds that peaceful picketing by two unionmen at the customer entrance of an employer's business, and in *Alloy* that distribution of a "we do not patronize" list coerces employees within the *clear meaning* of 8(b)(1)(A). Rejecting its previous approach, the Board states that if the union activity has a restraining or coercive effect on the employees, and "if such coercion cuts into their privilege to choose or reject any particular union, the only 2 essential elements of the unfair labor practice spelled in Section 8(b)(1)(A) have been established."³³ The majority opinion dismisses the long line of earlier precedent as "dubious" authority,³⁴ and relies for its novel conclusion on dictum from a series of Supreme Court cases which dealt exclusively with the constitutional power of a state to regulate picketing.

pany to accept a discriminatory contract did not violate 8(b)(1)(A)); *United Constr. Workers, Dist. 50, United Mine Workers and Kanawah Coal Operators' Ass'n*, 94 N.L.R.B. 1731 (1951) (strike and picketing to achieve the unlawful objective of a closed shop contract held not to violate 8(b)(1)(A)); *Miami Copper Co. and Local Union No. 518, Int'l Brotherhood of Elec. Workers*, 92 N.L.R.B. 322 (1950) (strike to force employer to adjust grievances of employees with a minority union held not to violate 8(b)(1)(A)); *Lumber Workers Union, AFL and Santa Ana Lumber Co.*, 87 N.L.R.B. 937 (1949) (picketing and strike by a minority union for recognition and a union shop contract in the absence of violence or threats held not to violate 8(b)(1)(A)); *Perry Norvell Co. and United Shoe Workers, CIO*, 80 N.L.R.B. 225 (1948) (picketing by minority union seeking recognition held not to violate 8(b)(1)(A) in the absence of violence, intimidation or threats); *Local 74, United Brotherhood of Carpenters, AFL and Watson's Specialty Store*, 80 N.L.R.B. 533 (1948) (peaceful picketing by a union which represented none of the employees held not to violate 8(b)(1)(A)).

32. *Local 74, United Brotherhood of Carpenters, AFL and Watson's Specialty Store*, 80 N.L.R.B. 533 (1948).

33. 41 L.R.R.M. at 1026.

34. *Id.* at 1031.

C. The Legislative History

It is interesting to note that on the Senate floor the charge was made that 8(b)(1)(A) might be read literally to outlaw peaceful picketing. Senator Taft, the leading proponent of the act, stated in reply:

I can see nothing in the pending measure which . . . would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It *would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion*. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.³⁵ (Emphasis added.)

[The cease and desist order] will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.³⁶

Significantly, in deference to the fears of some Senators that this section might be read to mean that peaceful activities by unions to persuade employees to join would be prohibited, the words "to interfere with" were deleted from the amendment.³⁷

It was repeatedly asserted by its sponsors that in 8(b)(1)(A) Congress was dealing with "threats or false promises or false statements,"³⁸ "the coercion of goon squads and other strong-arm organizing techniques,"³⁹ "threats of violence or of reprisal,"⁴⁰ and direct interference by "mass picketing and other violence."⁴¹ Read as a whole, the legislative history strongly suggests that Congress intended by this section to eliminate physical force, threats, and intimidation which would actually coerce employees in their choice of a representative, as opposed to the incidental effect on employees of the economic pressure which peaceful picketing and related activities exert on the employer.

D. The Relevance of Section 8(b)(4)

As the majority opinion somewhat candidly admits, the real basis for its decision in *Curtis* is the economic harm to an ostensibly neutral employer. However, the legislative history of the act clearly indicates that 8(b)(4)⁴² is the section which is directed toward pro-

35. 93 Cong. Rec. 4436 (1947).

36. *Ibid.*

37. *Id.* at 4020-25, 4270-71.

38. *Id.* at 4016.

39. Curtis Bros., Inc., Trial Examiner's Intermediate Report and Recommended Order, Case No. 5-CB-190 at p. 8 (1956).

40. 93 Cong. Rec. 4434 (1947).

41. *Id.* at 4435.

42. 61 Stat. 141-42 (1947), 29 U.S.C. § 158(b)(4) (1952).

tecting neutral employers from unlawful economic pressures by unions. Clause *B* of this section prohibits secondary strikes, boycotts and picketing to compel an employer to deal with an uncertified union. Clause *C* specifically prohibits primary strikes and picketing to gain recognition where another union has been certified by the NLRB. Primary picketing after a no-union vote, as in *Curtis* and *Alloy*, and picketing after a decertification petition,⁴³ have not been prohibited.⁴⁴

Especially relevant to the facts presented by the *Curtis* and *Alloy* cases is a discussion by the joint congressional committee which was established to study and investigate the field of labor-management relations and to recommend legislation to the Congress. Senator Ball, chairman of the committee, made the following observation in his report to the Senate:

The Taft-Hartley law's *only* limitation [on recognition picketing] is that provided by section 8(b)(4)(C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.

A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.⁴⁵ (Emphasis added.)

It is apparent that the economic pressure of picketing has precisely the same effect on an employer and his employees after a no-union vote, as the economic pressure which is exerted by picketing after another union has been certified. If Congress so clearly intended to prohibit this conduct, seemingly it would have added the appropriate language to 8(b)(4)(C).

In point of fact, the "watch dog committee" considered an amendment to the act which would provide some relief to employers being picketed after an election had resulted in repudiation of the union. The committee rejected the suggestion with the statement that "further experience with the act is advisable before consideration is given to broadening section 8(b)(4)(C)."⁴⁶ This provision is not, of course, in the present statute except as it has been read into the law by the *Curtis* and *Alloy* cases under the guise of interpretation of 8(b)(1)(A).

43. See Painters' Dist. Council No. 6, Brotherhood of Painters, AFL and The Higbee Co., 97 N.L.R.B. 654 (1951) (where the Board held that picketing for the purpose of causing the employees to withdraw a decertification petition does not violate 8(b)(1)(A)).

44. In its discussion of 8(b)(4), the Conference Committee Report observed that the "primary strike for recognition (without a Board certification) was not prohibited." H.R. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947).

45. S. Rep. No. 986, 80th Cong., 2d Sess., pt. 3, at 70-71 (1948).

46. *Id.* at 71.

E. The Relevance of Section 8(c)

The Board's theory that minority recognitional picketing is "coercive" within the meaning of section 8(b)(1)(A) was extended in the *Alloy* case to include publication of a "we do not patronize" list containing the employer's name. In this case the Board reasoned that it was not material whether the "economic coercion" was applied through picketing the premises of the employer, through the use of oral appeals to consumers, or through "unfair" lists distributed to consumers and suppliers. The Board stressed the fact that the effect of such conduct is "to threaten the employer's business and necessarily the employees' job security."⁴⁷ Thus, it is likely that all minority union activity which may exert economic pressure on an employer is suspect, and likely to constitute a violation of 8(b)(1)(A).

"We do not patronize" lists are essentially appeals to consumers not to patronize a firm which is nonunion. That Congress had no intention of prohibiting such methods, merely because of the possibility of an adverse economic effect on employees if the appeals are successful, seems obvious in light of section 8(c). This section provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."⁴⁸

Since there was no evidence in the *Alloy* case that the distributed lists contained threats of force or reprisal for noncompliance, the Board's holding is necessarily based on the premise that mere distribution of such a list is in itself "coercive" of employees. The sweep of this doctrine is apparent. It leaves little vitality to the congressional direction that argument and persuasion were not to constitute or be evidence of unfair labor practices. "It erects some formidable hurdles for unions to surmount in winning bargaining rights for new units of employees."⁴⁹

This section of the act lends considerable weight to the argument that in 8(b)(1)(A), Congress was dealing with physical force, threats and intimidation by unions to compel individuals to join, rather than the indirect effect which might result from applying economic pressure on the employer.

47. 41 L.R.R.M. at 1060.

48. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1952).

49. Lab. Rel. Rep. (41 Analysis 6-7) (1957).

F. The "New" Test of Coercion

The decisions in *Curtis* and *Alloy* are not objectionable merely because of the Board's startling construction of the legislative intent behind 8(b)(1)(A), or because of the apparent disregard for the principle of *stare decisis*. More significant is the far-reaching effect of its theory of "coercion." The best illustration of the sweep of this theory can be seen in the *Alloy* case. There the Board makes it clear that rejection by the employees in an election is not an essential element of the unfair labor practice. Picketing for recognition in any case in which the union does not represent a majority of the employees apparently violates section 8(b)(1)(A).

Further, this new theory casts considerable doubt on the legality of organizational activities of labor unions. By emphasizing that the purpose of the union activity in *Curtis* and *Alloy* was improper in that it sought immediate recognition by a union which did not represent a majority of the employees, the Board was able to refrain from specifically ruling on the legality of minority picketing for organizational purposes. The Board intimates, with no suggestion of the criteria which it will use, that in such a case it will undertake the "difficult and delicate responsibility" of attempting to balance the conflicting interests and rights.⁵⁰ However, it is extremely doubtful that the Board will not extend the holding of these cases to all picketing by a minority or stranger union. To fail to do so would be to permit the legality of picketing to depend upon its purpose or objective. Since it appears obvious that the objective of picketing cannot influence its nature or its effect upon employees or employers, it would be unrealistic to cling to such a distinction. Picketing for organizational purposes of course exerts the same "coercive" force on any dissenting employee as does picketing for recognition. Significantly, the Board expressly recognizes this and stresses *not* the purpose of the union activity, but its economic effect on employer and employee.⁵¹

More important from a practical standpoint, if the legality of union activity were to depend solely upon its purpose, labor organizations could avoid the force of this decision by carefully directing their appeals to consumers or employees. As long as the union does not seek the "unlawful" objective of immediate recognition, such activity seemingly would be lawful. In fact, the Board in *Curtis* dismisses this possible loophole by stating: "even assuming . . . that all picketing was aimed at consumers, its coercive effect upon the

50. 41 L.R.R.M. at 1028.

51. *Id.* at 1027, 1059-60.

employees who desired to continue working was not thereby lessened . . . if anything, the 'consumer appeal' argument of the Respondent stresses *all the more* the economic coercion intended by the Union's picket line."⁵²

Of course, in all union activity the eventual objective is recognition as bargaining agent. If the union is naive enough to "intend" immediate recognition, it violates the act. The Board will, if it adheres to this distinction, find itself embroiled in the impossible task of determining subjective intent of a union which is admittedly bent on eventual recognition. This will likely lead to imputation of the motive of immediate recognition. The objection to such a course, aside from any practical difficulty, is that it may lead to the imputation of such motive where none *in fact* exists. It has been argued that when courts "wish to enjoin picketing it is labeled 'recognition'; when they feel it should not be enjoined, it becomes 'organizational'."⁵³ Illustrative of this perhaps, is the *Alloy* case, where after the election the union activity complained of was directed at consumers exclusively. Nevertheless, the Board found a violation of 8(b)(1)(A) because the union was "intent on securing exclusive recognition" as the employees' bargaining agent.⁵⁴

Thus, it can be seen that the Board has either: (1) placed itself in the anomalous position of differentiating between conduct which has the same economic effect on employees and which is indistinguishable by use of objective criteria; or, (2) decided that all picketing by minority or stranger unions is unlawful in that it constitutes a violation of 8(b)(1)(A). Although the *Curtis* theory of coercion would logically support the latter position, the objections to such an interpretation of 8(b)(1)(A) seem manifest.

It will certainly be difficult for the Board to find congressional intent which would justify proscription of all minority picketing and related activities. To reach such a result by interpretation of the somewhat ambiguous language of section 8(b)(1)(A) would relegate the specific provisions of section 8(b)(4) to mere redundancy, and would ignore the congressional attempt in 8(c) to protect argument and persuasion. It is significant to note that both the bill passed by the House⁵⁵ and an early committee version of the Senate Bill⁵⁶ contained provisions which would have made all minority

52. *Id.* at 1027. (Emphasis added.)

53. Vladeck, *Organizational and Recognition Picketing*, New York University Eighth Annual Conference on Labor 207 (1955).

54. 41 L.R.R.M. at 1059.

55. See Legislative History of the Labor Management Relations Act 158 (1947).

56. *Id.* at 112.

picketing illegal. These provisions are not, of course, a part of the present statute. They should not be read into the law by administrative action.

Moreover, a determination that all minority picketing is to be prohibited is a policy decision of the greatest magnitude. Important but conflicting interests must be considered and weighed. The desirability of protecting a neutral employer from economic harm is persuasive. It is, of course, important to protect the individual employee's freedom to accept or reject union representation. The public has an interest in protection from unproductive strikes and other concerted activities. However, the interest of the union in strengthening its position by spreading organization must not be overlooked. Before bargaining patterns are established, employees must be organized. "Should the law not recognize that even if the picketing union is not yet the employee's organization, nevertheless the outsiders have a very real interest in spreading union organization in order to protect the union wage scale and labor standards against the competition of low cost goods?"⁵⁷ And, should the union not have an opportunity to publicize to sympathetic consumers its dispute with a non-union shop? Perhaps employees, influenced by the union's show of strength, will change their minds and vote for organization.

Although Congress has indicated its policy to favor collective bargaining, it has also indicated its policy to favor employees' freedom of choice.⁵⁸ It has not clearly indicated its policy when these interests collide. In such an explosively controversial area, and in light of the prior experience with the "unlawful objectives" approach, it would seem preferable to await such a policy decision by Congress.⁵⁹

III. CURTIS AND ALLOY: THE CASE FOR

The decisions of the NLRB in *Curtis* and *Alloy* present two broad issues: one a question of authority, the second a question of propriety. Initially it must be determined whether the NLRB can subject all minority picketing and related activity to regulation under section 8(b)(1)(A). (As to this issue it is imperative to note that regulation is not a synonym for prohibition.) This determina-

57. Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 L.R.R.M. 48, 56 (1954).

58. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1952).

59. Cf. Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957), where the authors suggest "remanding" the problem of enforcement of collective bargaining agreements and federal substantive law in such cases to Congress for more definite legislation.

tion will be facilitated by examining the intent of Congress in passing 8(b)(1)(A); the limitations imposed on its use by earlier Boards; and the implicit authorization to be derived from the general tenor and structure of the act.

Assuming that these examinations support the conclusion that the NLRB *can* regulate minority picketing and related activity under 8(b)(1)(A), the second broad issue is whether the NLRB *should* regulate such activity. Consideration will be given to the dangers of immunizing any of these activities, and the Supreme Court's tacit approval of regulation of minority activities. Assuming that there is sufficient justification for regulating such minority activity, final consideration will be given to the proposition that the only appropriate and effective means of regulation is to permit the NLRB to adopt a broad interpretation of 8(b)(1)(A).

A. The NLRB Was Not Precluded From Adopting a Broad Interpretation of Section 8(b)(1)(A)

Legislative history

The legislative history of 8(b)(1)(A) is inconclusive. It does not clearly demonstrate that Congress intended to restrict the application of 8(b)(1)(A) to picketing accompanied by violence or threats against specific individuals. Nor does it conclusively demonstrate that Congress intended to apply 8(b)(1)(A) to all minority activity. However, it does supply the Board with some support for the position taken in *Curtis* and *Alloy*. This support is found in cases of peaceful minority picketing which were introduced as examples of "coercion." While it is not argued that these examples constitute an overwhelming preponderance in favor of regulation of *all* minority activity under 8(b)(1)(A), they do rebut any claim to a preponderance of a contrary interpretation which would restrict the application of that section to picketing accompanied by violence or threats against specific individuals.

In introducing 8(b)(1)(A) as an amendment, Senator Ball described as "coercion" a case where the union continued to picket after it had been rejected by the employees. He pointed out that:

None of the employees have left their jobs and the sole purpose of the picket line is to intimidate, coerce and force . . . employees to accept Local No. 886 as their bargaining agent, notwithstanding the decision of the employees to the contrary.⁶⁰

Senator Taft then offered the NLRB case of *Hall Freight Lines*⁶¹

60. 93 Cong. Rec. 4017 (1947).

61. *Hall Freight Lines and Local 705, Int'l Brotherhood of Teamsters, AFL*, 65 N.L.R.B. 397 (1946).

to demonstrate that economic pressure by a minority union could readily induce the employees to reject a prior decision not to join the union. When Senator Pepper objected that the case did not involve physical threats,⁶² Senator Taft replied:

The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat, *and that is coercion* — something they had no right to do.⁶³ (Emphasis added.)

Senator Taft then demonstrated that this type of "coercion" could be effectively directed at all the employees, not just union members, by referring to a case where the union said:

'We want to organize your employees. Call them in and tell them to join our union.' The employers said, 'We have not any control over our employees. We cannot tell them [to join] under the National Labor Relations Act.' They said, 'If you don't, we will picket your plant; and they did picket it, and closed it down for a couple of months. Coercion is not merely against union members; it may be against all employees.'⁶⁴

Senator Taft then offered the pertinent conclusion that these examples demonstrate that "*there are plenty of methods of coercion short of actual physical violence.*"⁶⁵ (Emphasis added.)

However, it is argued that these examples are irrelevant because if Congress had intended to restrain minority picketing where the employees have repudiated the union, it would have done so under 8(b)(4)(C)⁶⁶ which provides that it shall be an unfair labor practice for a union to picket for recognition where another union has been certified as the bargaining representative. This argument is usually supported by reference to a report of the "watchdog committee"⁶⁷ in 1948 which states that minority recognition picketing is not a violation of the act and suggests that the only appropriate method of outlawing such picketing would be to amend 8(b)(4)(C). In reality this report is *post* legislative history which overstates the Board's interpretation of the act in *Perry Norvell*.⁶⁸ This report was designed merely to present the existing interpretation of the act and cannot be used as evidence of what Congress intended when it passed the act.

Furthermore, it would seem that the presence of 8(b)(4)(C) can be explained as a desire on the part of Congress to set apart

62. The NLRB had specifically found that there was no violence or threats of violence. See 65 N.L.R.B. at 402.

63. 93 Cong. Rec. 4023 (1947).

64. *Id.* at 4024.

65. *Ibid.*

66. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(4)(C) (1952).

67. S. Rep. No. 986, 80th Cong., 2d Sess., pt. 3, at 70-72 (1948).

68. 80 N.L.R.B. 225 (1948).

specific acts of picketing because it considered their objects so oppressive that they warranted a special remedy — the mandatory injunction.⁶⁹ However, it does not follow that this “singling out” process was intended to be the only restriction on picketing or other minority activities. It would appear that Congress intended that 8(b)(1)(A) should also apply to minority activity including picketing, but the exact extent of regulation cannot be conclusively ascertained.

Due to the presence of conflicting statements in the legislative history, there is no clear legislative intent to restrict the application of 8(b)(1)(A). Thus, the NLRB was not precluded from adopting a broad interpretation of that section.

Prior case law

The earlier Board decisions in *National Maritime Union*⁷⁰ and *Perry Norvell*⁷¹ interpreted 8(b)(1)(A) as outlawing only that picketing which was accompanied by physical violence or threats of reprisal against specific individuals. On the basis of the foregoing analysis of the legislative history, it would seem that the earlier Board adopted too restrictive an interpretation of 8(b)(1)(A).⁷²

Perhaps the present Board would have been required to examine the earlier decisions more critically if the original restriction on the application of 8(b)(1)(A) had been consistently followed. However, the use of 8(b)(1)(A) *was not* limited to picketing accompanied by violence or threats against specific individuals. An outstanding example of this deviation is the decision in *Clara-Val*,⁷³ where the Board found a violation of 8(b)(1)(A) in a threat to strike to force an employer to discharge an employee who had crossed a picket line. The threat of economic reprisal was not confined to the specific individual but directed at the job security of all the employees.⁷⁴

69. The chief legal officer or the regional attorney is ordered under § 10(1) of the Taft-Hartley Act, to give priority to 8(b)(4)(C) charges, and petition for an immediate injunction if he has reasonable cause to believe that the charge is true. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 160(1) (1952).

70. 78 N.L.R.B. 971, 985 (1948).

71. 80 N.L.R.B. at 239.

72. Aside from an erroneous interpretation of legislative history, *National Maritime* and *Perry Norvell* must be distinguished from the instant case on their facts. In *NMU*, the strike was conducted by a majority; while in *Perry Norvell*, the question of whether the strikers represented a majority or minority was never decided because it was immaterial to the theory on which the case was tried and decided.

73. 87 N.L.R.B. 703 (1949).

74. The Board stated that if the union succeeded in its threat, “the discharge and the reason for it would inevitably become known to the other employees, and would coerce and restrain them to join the Union or retain their membership in it.” 87 N.L.R.B. at 705.

Other inconsistent applications of *NMU* occurred in *Great Atlantic and Pacific Tea Co.*⁷⁵ and in *Peerless Tool*.⁷⁶ In the former case, the Board found a violation of 8(b)(1)(A) where the union did not picket but threatened to secure the discharge of any union member in bad standing. In *Peerless Tool* the Board found that a threat to refuse to process the grievance of any union member in bad standing violated 8(b)(1)(A). In both of these cases the union's attempt to effectuate discipline was directed at all the employees, not just specific individuals.⁷⁷

However, it is argued that the prior case law interpreting 8(b)(1)(A) is significant because it repeatedly rejected the theory that peaceful inducements to customers which indirectly threaten the job security of employees is "coercion." While this argument ignores cases like *Pinkerton's*⁷⁸ and *Capital Service v. NLRB*⁷⁹ which found an 8(b)(1)(A) violation in peaceful picketing directed at customers, its chief failing is that it is supported by only one case, *Watson's Specialty Store*. It is true that in that case the Board refused to find that peaceful picketing directed at consumers was a violation of 8(b)(1)(A), but the strength of that case as establishing a "long line of cases rejecting the present theory of coercion"⁸⁰ is questionable. In fact, the dissent in *Curtis* and *Alloy* apparently did not consider the case important enough to warrant citation.

Structure of the act

As noted above, the legislative history is inconclusive as to the exact limitations that Congress intended to place upon the interpretation and application of 8(b)(1)(A). Thus, in the absence of a

75. 110 N.L.R.B. 918 (1954).

76. 111 N.L.R.B. 853 (1955).

77. A more recent application of this principle appeared in *Local 886, Int'l Brotherhood of Teamsters, AFL-CIO and Unit Parts Co.*, 119 N.L.R.B. No. 34, Lab. Rel. Rep. (41 L.R.R.M. 1056) (1957). In that case the Board found an 8(b)(1)(A) violation where a certified union which already represented a majority, refused to sign a wage contract with the employer unless eighty per cent of the employees joined the union. The Board reasoned that the threat to withhold benefits of a contract was economic coercion designed to force employees to join against their will.

78. 90 N.L.R.B. 205 (1950).

79. 204 F.2d 848 (9th Cir. 1953), *aff'd on other grounds*, 347 U.S. 501 (1954). In this case the court of appeals reproached the Board for not finding that peaceful picketing by a minority union was a violation of 8(b)(1)(A) because:

Here is more than an appeal to the *employees* to persuade *their* action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work. 204 F.2d at 853.

The court justified this result by concluding that Congress intended "restraint and coercion" be used consistently in 8(a)(1) and 8(b)(1)(A).

80. See text p. 466 *supra*.

clear legislative intent, the Board quite properly turned to the literal words of the act to determine the application of 8(b)(1)(A). It found that under the literal reading:

If minority union picketing has a restraining or coercive effect upon the employees, and if such coercion cuts into their privilege to choose or reject any particular union, the only 2 essential elements of the unfair labor practice spelled in Section 8(b)(1)(A) have been established.⁸¹

At first glance it would appear that to define "coercion" in terms of "coercion" is circular. However, the key to the present interpretation and application of 8(b)(1)(A) is that the Board apparently considers the section a general enforcement provision which will enable it to effectuate the policies of the act. In reality it would seem that the Board made a policy decision that the minority activity present in *Curtis* and *Alloy* was contrary to the general tenor of the act, and having once determined that it was not bound by any clear restrictions, it worded those decisions in terms of "coercion."

This approach is neither shocking nor dangerous. The Board has consistently utilized it in applying section 8(a)(1).⁸² There has never been any question of abuse in using 8(a)(1) as a general enforcement provision. The similarity in the wording of the two sections and the numerous references in the legislative history to the effect that 8(b)(1)(A) was to be used in the same manner as 8(a)(1),⁸³ lend considerable support to the argument that Congress intended both sections to be general enforcement provisions, one directed at unfair labor practices of employers, the other to apply to acts of unions. It is not reasonable to assume that Congress was not aware of the effectiveness of 8(a)(1) as a general enforcement tool or that it cast 8(b)(1)(A) in the same frame but intended the Board to use it in a very limited manner. It would seem that the justification for the general language of 8(a)(1) could well apply to 8(b)(1)(A). Congress could not specifically enumerate everything that it sought to prohibit, nor did it desire to foreclose regulation of future variations on existing unfair labor practices.⁸⁴ In

81. 41 L.R.R.M. at 1026.

82. Perhaps the clearest demonstration of the broad scope of 8(a)(1) is found in the fact that a violation of *any* subsection of 8(a) is also a violation of 8(a)(1). See *NLRB v. Express Publishing Co.*, 312 U.S. 426, 432-33 (1941).

83. See, e.g., the statement of Senator Smith who was a member of the committee which drafted 8(b)(1)(A): "The only intent is to prevent restraint or coercion by a labor organization or by employers, and we think the rules should be the same for one side as for the other." 93 Cong. Rec. 4435 (1947). See also *id.* at 4021, 4432, 4434.

84. The intent in passing the original 8(a)(1) and its relationship to other employer unfair labor practices, was stated in a senate report on the

accord with the accepted theory of administrative regulation,⁸⁵ it enacted 8(a)(1) and 8(b)(1)(A) and left to the Board the job of implementing the general policy laid down by the act.

But it is argued that the test of "coercion" advanced in *Curtis* is subject to abuse and not susceptible of control, therefore Congress could not have authorized such an interpretation. The argument seizes on the majority's test of coercion and concludes that it could be applied to all picketing because implicit in all picketing is a threat to the security of the employees.⁸⁶ Quite obviously this is an attempt to compel the majority to expand its interpretation and application of "coercion" to the point where it would fall of its own weight. The argument ignores the fact that the majority's test of coercion is limited by the provisions of section 7.⁸⁷ For example, a majority strike for recognition cannot deprive the minority of any rights because they have lost their right to choose their own representative under the "majority rule" principle⁸⁸ of section 7. However, when a majority of employees exercise their right under section 7 to *refrain* from selecting a union, the present test of coercion applies and the minority is forbidden from engaging in any activity which jeopardizes the job security of the majority. It appears that it would be immaterial whether the picketing was for recognition or organization if it in fact seeks reprisal for exercise of a protected right.

Thus, in the absence of a clear legislative intent to restrict the interpretation and application of 8(b)(1)(A), the NLRB could properly infer that Congress intended that section to be regarded as a parallel to 8(a)(1) and used as a general power to effectuate the policies of the act.

B. All Minority Picketing and Related Acts Should be Subject To Regulation by the NLRB Under Section 8(b)(1)(A)

Assuming that the NLRB *can* regulate all minority picketing

Wagner Act. "The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome." Legislative History of the National Labor Relations Act 2309 (1935).

85. See Davis, Administrative Law 54-59 (1951).

86. See 41 L.R.R.M. at 1035.

87. *Id.* at 1028.

88. This principle is spelled out in § 9(a) of the act which requires that the bargaining representative be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . ." See, e.g., NLRB v. A. J. Tower Co., 329 U.S. 324 (1946); NLRB v. Indianapolis Newspapers, Inc., 210 F.2d 501 (7th Cir. 1954). See also Legislative History of the National Labor Relations Act 2312-13, 2336-37 (1935).

89. See 41 L.R.R.M. at 1025, 1059.

and related activities under 8(b)(1)(A), it is necessary to determine whether the Board *should* regulate such conduct.

In *Curtis* and *Alloy* the Board found that the purpose of the minority picketing was to gain recognition.⁸⁹ Assuming that this finding is supported by the facts, the policy considerations dictating restriction of this activity are apparent. What the union seeks to gain can only be obtained by an illegal capitulation. Either the employer will be forced to accede to the demand and recognize a union representing only a minority (if any) of his employees as the exclusive representative of *all* his employees, or, he will be forced to go to his employees and persuade them to accept a union which they have just rejected. It is immaterial whether he "persuades" them by merely suggesting that they reconsider their choice, or by telling them that unless they agree to accept the union he will have to cease operations. In either recognizing the minority union outright or persuading his employees to accept it, he violates both section 8(a)(1) and 8(a)(2).⁹⁰

However, a far more difficult problem is presented where it is not clear that the union is seeking recognition. Assuming that the facts in *Curtis* and *Alloy* do not compel the conclusion that the union was seeking recognition, but was merely organizing, or assuming that there is no reliable means of distinguishing between organizational and recognition picketing, the question becomes one of determining what considerations would support restriction of minority activity regardless of its purpose. It is not the intention of this examination to advocate prohibition of all minority activity, but rather to present the policy considerations that argue that all minority picketing and related activities should be *subject to regulation* under 8(b)(1)(A).⁹¹

Dangers of immunizing any minority picketing or related acts from regulation.

Inherent in all picketing and related acts is the presence of potential or actual economic pressure, regardless of the number of participants.⁹² Therefore, it would appear that minority picketing and related acts should be subject to *regulation* merely because they could exert substantial economic pressure. If allowed to exist with-

90. See, e.g., *I. Spiewak & Sons and Amalgamated Clothing Workers*, CIO, 71 N.L.R.B. 770 (1946); *Midwest Piping and Supply Co. and United Steel Workers*, CIO, 63 N.L.R.B. 1060 (1945).

91. The discussion will be primarily limited to picketing. However, in view of the extension in *Alloy* of 8(b)(1)(A) to a "we do not patronize" list, and consumer appeals, other facets of minority activity must also be subjected to these considerations.

92. See note 25 *supra*.

out regulation, these activities could be utilized to effectively destroy the free choice of employees. Those employees who would be forced into joining the union may tend to be disinterested in the policies and leadership of the union. As a result of this apathy, irresponsible leadership could be created which would operate to the detriment of the public and the union movement in general. Further, complete immunization of any minority picketing and related acts could promote irresponsible organization. With license to use coercive organizational tactics, the union may be encouraged to recruit more members than it can adequately service.

It could be argued that organizational picketing and related activity by a minority union should be immune from regulation so as to allow the minority union to compete with the employer's natural advantage to discourage organization. However, it would seem that the employer's position alone does not justify *complete* immunity. Further, it must be noted that it would be anomalous to grant the minority union license to utilize any economic pressure to encourage union membership while retaining the present restrictions on the employer's use of such pressure to discourage organization.⁹³ The union should also be subject to regulation in their use of economic pressure and:

The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.⁹⁴

Both *Curtis* and *Alloy* presented another aspect of immunizing any minority picketing or related activity. These cases involved activity by a minority union which had just lost a Board conducted election.⁹⁵ Although the majority of the Board in *Alloy* indicated that the presence of an election is not an essential factor,⁹⁶ it is obvious that whenever coercive minority activity is continued beyond the time when the union has been rejected by the employees in a Board election, it must be restrained because it is clearly contrary to section 9⁹⁷ of the act. The purpose of section 9 is to provide a means of resolving a question of representation so that the employer-employee relationship may function smoothly.⁹⁸ Congress

93. See, e.g., *Beaver Machine & Tool Co. and United Steelworkers*, CIO, 101 N.L.R.B. 1782 (1952); *Lane Drug Stores, Inc. and Retail Clerks*, AFL, 88 N.L.R.B. 584 (1950). Perhaps the most liberal view in this area is found in *National Carbon Co. and United Gas Workers*, CIO, 65 N.L.R.B. 830 (1946).

94. *Capital Service, Inc. v. NLRB*, 204 F.2d 848, 853 (9th Cir. 1953).

95. See note 11 *supra*.

96. See note 10 *supra*.

97. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (1952).

98. See Legislative History of the National Labor Relations Act 2976-77 (1935).

considered the element of stability in the representation of employees so important that it made the results of a Board election binding for at least a year.⁹⁹ It devised a rather elaborate procedure to insure a fair and accurate election. To permit a union to lose an election one day and resume picketing the next, destroys this stability, encourages rejected unions to utilize picketing as a means of displaying their pique, and operates to create an atmosphere of tension and mistrust. The net result is that the Board, by conducting an election, has only succeeded in determining that the employer is engaged in interstate commerce.

Not only does the continuance of minority activity after a Board election endanger industrial security, but it substantially damages the prestige and efficiency of operation of the NLRB. If the Board cannot insure that an election will actually resolve a question of representation, it would be a waste of time and money to initiate a representation petition. Faith in the ability of the Board to protect the rights of those who honestly seek the protection of its processes must be insured. The ability of the Board to effectively resolve labor disputes depends upon the degree of respect accorded its agents and procedures. The only manner in which this respect can be maintained is to prohibit those activities which deliberately defy the power and prestige of the NLRB.

The Supreme Court has recognized that minority picketing and related activity can be subject to regulation.

Since 1949, the Supreme Court has adopted the position that peaceful picketing is more than free speech.¹⁰⁰ As a result, the Court has consistently permitted state regulation of peaceful minority picketing where it violates established state policy.¹⁰¹ Recently, in *Teamsters v. Vogt*,¹⁰² the Court appeared to give tacit approval to restraint of peaceful minority activity under the Taft-Hartley Act. In that case, the Court upheld the validity of a Wisconsin statute making it an unfair labor practice to picket peacefully to force an employer to recognize a union that did not represent its em-

99. Section 9(e) (2) provides that "No election shall be conducted . . . in any bargaining unit . . . within which, in the preceding twelve-month period, a valid election shall have been held." 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(e) (2) (1952).

100. The trend started in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). See also *Hughes v. Superior Court*, 339 U.S. 460 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950).

101. See *Teamsters v. Vogt*, 354 U.S. 284 (1957); *Garner v. Teamsters*, 346 U.S. 485 (1953); *Building Service Union v. Gazzam*, 339 U.S. 532 (1950).

102. 354 U.S. 284 (1957).

ployees.¹⁰³ The Court agreed with the state court that the picketing was "to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State," and concluded, "For a declaration of similar congressional policy see Section 8 of the Taft-Hartley Act."¹⁰⁴

The willingness of the Court in these cases to view "free speech" as a limited concept in the field of labor relations would seem to indicate that it would consider customer appeals and "We do not patronize" lists in the same light as minority picketing. Certainly they represent an integral part of a scheme which exerts substantial economic effect on the employees. But the problem of whether the Court would declare them to be within the protection of "free speech," or whether it would limit the permissible use of such devices, is conjectural at this point. What is material is that the Court has not specifically foreclosed the argument that these related activities should be subject to regulation.

The only effective method of regulating minority picketing and related activity is to allow the NLRB to place a broad interpretation on section 8(b)(1)(A).

In considering whether minority activity should be regulated under 8(b)(1)(A), the argument is frequently made that the only appropriate remedy for the problem of minority activity would be for Congress to legislate specific amendments to sections, such as 8(b)(4)(C), that would delineate exactly what acts could be restrained. However, the presence of many "pressure" groups, with special interests to protect, guarantees that the process of amending the Taft-Hartley Act will be difficult and time-consuming.

Furthermore, specifically amending the Taft-Hartley Act cannot be the *sole* answer. To limit union unfair labor practices to specific acts and repeal the general enforcement provision, only encourages evasions around the specifics. To solidify the law in this manner would deprive the NLRB of the power to restrain conduct which is clearly contrary to the policies of the act, until Congress amended the statute. Congress never intended such a result. It granted the Board the discretionary power to determine what will effectuate the

103. Wis. Stat. § 111.06(2)(b) (1953), makes it an unfair labor practice for an employee individually or in concert with others to "coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights. . . ."

104. 354 U.S. 284, 294 (1957). See also *Garner v. Teamsters*, 346 U.S. 485 (1953), where the Court observed that picketing to coerce employers into compelling or influencing their employees to join the union was within the scope of federal power. "In language almost identical to parts of the Pennsylvania statute, [Congress] has forbidden labor unions to exert certain types of coercion on employees through the medium of employers." *Id.* at 488-89.

policies of the act,¹⁰⁵ and by enacting 8(b)(1)(A), it equipped the Board with a flexible means of enforcing those policy decisions.

A return to a restrictive interpretation of 8(b)(1)(A) would be undesirable. The Board must be free to interpret the act in the light of the highly volatile conditions in the field of labor relations. What today is clearly contrary to the purposes of the act was barely conceived as a threat to industrial stability ten years ago. The Board must be equipped with a device to meet these new complications. The development of 8(b)(1)(A) as a general enforcement provision in the hands of a competent and judicious Board is the only effective means of accomplishing this end.

IV. SYNTHESIS

Any determination of the permissible scope of minority picketing and related activities is basically a policy decision. Three conflicting interests must be weighed: (1) the interest of the employer in carrying on his business free from interference; (2) the interest of a labor organization in promoting unionization as a means of raising the standards of labor; and (3) the interest of the employee in being free to join or not to join a labor union.

Although it seems clear that the employer's right to carry on his business was earlier thought to be paramount, the era of the New Deal effected a reversal of this feeling, giving predominance to the unions' interest in organizing on an industry wide basis. The Taft-Hartley Act attempted to restore a more equitable balance, and injected a policy determination seeking to protect the individual employees' interest in freedom of choice. The act does not, however, provide an adequate direction for balancing these conflicting interests in those cases, such as peaceful minority picketing and related activities, that do not fall within its specific provisions. Such direction is necessary. This might be accomplished in any of several ways.

Congress might feel it desirable to outlaw all minority picketing and related activities, or to permit all such activities if conducted in a peaceful manner. Specific prohibitions of certain types of union activity might be codified or the problem might be left fully within the discretion of the NLRB to determine when and in what manner certain union conduct is to be regulated.

105. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941), where the Supreme Court described the Board as an:

... agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. . . . [I]t acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce. . . .

However, it would seem preferable, considering both the expertise of the Board and the policy making function of Congress, that Congress do no more, nor no less, than formulate a policy decision as to which interest—employer, employee, union—must prevail when in irreconcilable conflict. This would leave to the Board the responsibility of determining when these interests do in fact conflict, and what remedy would best effectuate this policy determination.

Whatever may be the proper solution, an intensive examination into the criteria previously adopted by the Board and the courts, and a re-evaluation of their effectiveness is called for. Certainly violence, threats, intimidation, and false propaganda should be considered as factors in determining when union conduct should be regulated. However, to condone all activity which is free from these elements would seem to be unsound, since it ignores the harmful economic effect of some "peaceful" union conduct. Similarly, the objectives test adopted in the *Curtis* case appears unsatisfactory. This test attempts to distinguish between the motives of "recognition" and "organization." Since the facts in nearly every case will give rise to an inference of either motive, the "objectives" test should not be relied upon as a realistic tool for determining legality of union conduct.

What is called for is a rejection of conceptualistic formulas. Needed is a factual inquiry into the actual effect of certain union activity; the necessity for its use to achieve the unions' purpose; and the alternative methods which might reasonably be used and their effectiveness.

Initially, it would appear that no union activity which is peacefully conducted should be restrained until the union has been proven to be a minority in a Board election. The determination of minority status on the basis of an unofficial election is certainly susceptible of abuse and rarely would permit complete freedom of choice. A Board election is the only reliable means available for determining the choice of employees in a relatively neutral atmosphere.

Further, the union should be permitted to use peaceful activity, including picketing, for a reasonable length of time *prior* to a Board election, in order to demonstrate the union's effectiveness and its benefits to the employees. The determination of what is a reasonable length of time should turn on the facts of the particular case. For example, a reasonable length of time for a union to have the opportunity to organize a textile mill in Alabama will be longer than a reasonable time necessary for a union to make its appeal to the employees of a retail dry-goods shop in Detroit. After the union

has had a reasonable opportunity to organize, this activity should be construed to raise a question of representation which will support a petition for election.

Once an election is held and the employees cast their ballots for "no union," it would appear that little useful purpose can be served by permitting the union to continue its activities for recognition. However, after losing such an election, the union certainly has a valid and continued interest in publicizing that: (1) the welfare of its organized shops will be endangered by competition from nonunion shops; and (2) it seeks to persuade the employees who have just rejected it to reconsider their choice after the one-year election bar expires.

The means of publicizing these interests should not be completely restricted, nor should they be immune from regulation. They might be subjected to a "reasonable alternatives" test. Factual inquiry should be made to determine the relative effectiveness of picketing, unfair lists, publication through newspaper ads, and so forth, in order to determine whether or not one method might not be as effective in publicizing the union's interests as another more harmful method. Furthermore, this test should be extended to the methods themselves. For example, if it is determined that picketing is the only effective way for a union to publicize the fact that a retail establishment is nonunion, and thus invite sympathetic consumers to patronize elsewhere, that picketing would not be restrained if used in a reasonable manner under the literal application of the "availability of alternative means" test. However, it may be confined to consumer entrances. On the other hand, at a manufacturing establishment, picketing might be prohibited altogether but the use of unfair lists permitted.

The criteria of a proven minority and availability of alternative means are of course not a panacea. However, the suggested approach seems clearly preferable to the continued use of conceptual solutions which are rigid, unrealistic and unworkable.